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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. ~~995~~ 32

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

J. H. RUTTER-REX MANUFACTURING COMPANY, INC.,
Et Al.
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY THE NATIONAL LABOR RELATIONS BOARD

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No. 925

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

J. H. RUTTER-REX MANUFACTURING COMPANY, INC.,
ET AL.
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY THE NATIONAL LABOR RELATIONS BOARD

Petitioner seeks certiorari on the ground that the opinion of the Court of Appeals invokes the doctrine of laches against an agency of the United States government. The Court of Appeals has not said that the Board's delay in issuing the backpay specification warrants setting aside the award on the ground of laches. In adjusting the backpay period, the Court of Appeals took such action as it deemed proper to "balance . . . the interest of the Board, of the Union, and the Employer" so that respondent would not bear the full burden of the Board's delay. Although the Court of Appeals found in the record "much factual justification"[1] for the view that the "backpay specification ought to be barred by the four-year delay on the part of the Board",[2]

[1]Board's Appendix 11a.
[2]Board's Appendix 11a.

the Court refused to set aside the Board's order or to apply the doctrine of laches. But the Court did find in this case that the Board's delay "was beyond the bounds of reason".[3] The Court considered and dismissed the Board's contention that its "inordinate" delay was due to an extremely heavy case load, commenting that even though the Board had six attorneys in its New Orleans office, "all of their attention was devoted to other cases, to the complete exclusion of this one",[4] although this was "one of the most important, if not the most important, compliance case pending before its Regional Office.[5] The Court commented that the Board "let the case slide along in total inaction for almost three years after we granted enforcement—and for five years after the union abandoned the strike".[6] The Board compounded its delay "beyond the bounds of reason" by its failure to attempt voluntary compliance in accordance with its rules[7] and its custom.[8]

In enforcing the Board order, the Court of Appeals has exercised its judgment as to the proper balance to be struck between conflicting interests, to use the language of this Court in *NLRB v. Brown*, 380 U.S. 278 at page 291-292.

The Court of Appeals recognized that it should not interfere with any reasonable exercise of the Board's discretion, but felt the Board's delay in this case to be

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[3]Board's Appendix 14a.
[4]Board's Appendix 15a.
[5]Board's Appendix 15a.
[6]Board's Appendix 15a.
[7]29 CFR § 101.13; 29 CFR § 101.15.
[8]R.1019-1022. The Board's enforcement officer testified that customarily an attempt is made to settle backpay questions prior to the filing of a backpay specification, but that in this case no effort to settle the backpay issue was attempted by the Board before filing the backpay specification in November of 1961, more than four years after its order was enforced by the Court of Appeals.

beyond the bounds of reason, and found that the delay was prejudicial to respondent in that, by the time the backpay hearing took place, all that respondent could do in an effort to carry the burden of proof placed upon it by *NLRB v. Miami Coca-Cola Bottling Co.*[9] "was to cross-examine the claimants in an effort to establish much of its defenses".[10] The Court of Appeals expressed reservations about the evidence upon which the Trial Examiner made his findings, and the rationale of the Court's conclusions appears in the following excerpt from the opinion (printed at page 18-A of the Board's Appendix):

> "The proof was often so sketchy that the Trial Examiner had to strain for his findings. Repeatedly, issues were resolved solely by applying the rule as to the burden of proof. Ordinarily, we would not take a second look at this, but after inordinate delay there is occasion for concern. We do not feel that the inordinate dalay barred all backpay, but some modification must be made."

Petitioner claims that the ruling of the Court of Appeals in this case "conflicts with this Courts decision in *NLRB v. Electric Vacuum Cleaner Corp.*, 315 U.S. 685.[11] The difference between this case and *Electric Vacuum Cleaner Corp.* is apparent on the face of the two opinions. In *Electric Vacuum Cleaners Corp.* the Court found "nothing in the record which would tend to justify us . . . in shortening the period of compensation."[12] In the present case, there is substantial evidence to support the Court of Appeals' conclusion that the effect of the Board's delay should not be borne by respondent alone. The Board did

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[9]360 F. 2d 569, 576 (5th Cir. 1966).
[10]Board's Appendix 17a.
[11]Page 8 of the petition for certiorari.
[12]315 U.S. at 697-698.

not file the backpay specification until November 4, 1961, more than six years after the termination of the strike in April of 1955, and more than four years after the enforcement of the Board order by the Court of Appeals.[13] During the intervening years the Board made no attempt to obtain voluntary compliance or to effect a settlement of the backpay claims which the Board contends were due because of respondent's alleged delay in achieving full compliance. The Board's compliance officer testified that his normal duties included an effort to effect voluntary compliance, but in spite of the unusual delay in this case, and respondent's request that it be advised if the Board contended that full compliance had not been achieved,[14] the Board did not contact respondent in an effort to achieve voluntary compliance or effect a settlement before the specification was filed in November 1961, by which time the alleged claims amounted to $342,000.[15] In enforcing the original Board order requiring reinstatement of the strikers who wanted to return to work, the Court of Appeals referred to the various problems involved in reinstating approximately 600 employees[16] and anticipated their resolution "in further administrative proceedings before the Board." The Board's order was not a simple one which could be implemented in a manner free from doubt. During the course of the backpay hearing, seven years after the company implemented its reinstate-

[13] *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 245 F.2d 594 (5th Cir. 1957).
[14] R. 957.
[15] R. 1023-1025.
[16] 245 F. 2d at page 598. The Court said: "The numerous questions which the employer insists now plague it, such as the possibility of non-strikers voluntarily terminating employment with subsequent replacement during the strike, the availability of work at various times considering the nature of these manufacturing operations, the number of strikers who may have declared their unwillingness to return to work, the lost pay, if any, the conduct of some specified strikers which may afford a basis for denying reinstatement, are not foreclosed. Their resolution can come either in further administrative proceedings before and through the Board or in direct contempt proceedings, if brought before us, for failure to comply with our order decreeing enforcement."

ment program, the attorneys representing the General Counsel and the Trial Examiner did not have easy answers to all of the legal problems involved. The Board's duty was to proceed with dispatch to the settlement of the problems inherent in the reinstatement problem anticipated by the Court of Appeals when it enforced the reinstatement order.[17]

In contending that the Court of Appeals should not have considered the Board's delay as justifying a modification of the backpay award, the Board relies upon *W. C. Nabors v. NLRB*, 323 F. 2d 686 (5th Cir. 1963). The *Nabors* case involved a Board finding of discriminatory discharge of certain employees followed by an order to reinstate them. The Board's order was resisted throughout the litigation by the respondent company in the face of a clearly defined obligation stated in the order, and the company's recalcitrance was such that the Board resorted to civil contempt proceedings. On the contrary, respondent was faced with an order which did not set forth a clearly defined obligation. The Board order did not name the individuals who were entitled to reinstatement, and did not provide the dates upon which they were due reinstatement. The Court of Appeals, in enforcing that order, took cognizance of the problems involved in implementing the order and anticipated their prompt resolution by the Board. The backpay specification in this case is evidence, not of resistance to the Board order, but of substantial compliance with it. Respondent in its various letters to the Board,[18] and particularly its letter of November 7,

[17] "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it, except that due regard shall be had for the convenience and necessity of the parties and their representatives." 5 USCA § 1005 (a).

[18] R. 949-957.

1957,[19] advised the Board of the reinstatement steps which had been taken and solicited the Board's cooperation so that respondent could take any additional steps which were necessary "in order to ensure full compliance with the decree".

The Board argues that its function is a public one and that it acts in a public capacity to carry out the purposes of the National Labor Relations Act. Respondent agrees, but the public function of the Board demands that it discharge its administrative duties with due consideration for the rights of *all* parties, including the respondent, and the Court of Appeals had the right to protect the respondent from the effect of the Board's delay. In *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir. 1961), the district court predicated an injunction against a Board hearing upon findings that a second remand order in an unfair labor practice case was in violation of the Board's duty to dispose of the case with reasonable dispatch. The Court of Appeals found that under Section 10(e) of the Administrative Proceedings Act the courts have the right and the duty to enforce the Act's requirements that the Board proceed with reasonable dispatch. The Court said (page 868):

> "*What is required is some balance between the interest of the Board, of the Union, and of the employer.* It should be recognized, on the one hand, that the court should not interfere with any reasonable exercise of the Board's discretion in controlling the progress of the proceedings pending before it. *On the other hand, adequate protection of the employer's rights should be afforded.*" (respondent's emphasis)

[19] R. 957.

Respondent submits that the Court of Appeals acted properly in exercising its jurisdiction to adjust the Board's backpay award so that respondent did not bear the full weight of the Board's delay in the discharge of its administrative duties.[20]

In *Wallace Corporation v. NLRB*, 159 F. 2d 952 (4th Cir. 1947), the court defined the duty of the Board in obtaining compliance with its orders:

> "Such general orders are analogous to interlocutory judgments of courts fixing liability but leaving for future determination questions as to amount of liability; and our decrees affirming or enforcing them are analogous to our affirmance of interlocutory judgments on appeal. After the general order of the Board for backpay and reinstatement is affirmed or ordered enforced by us, the *Board must work out the details of reinstatement and of the amounts to be paid as backpay under the general provisions of the order.* This can ordinarily be done by negotiation; but, if controversy arises, the facts must be found by the Board, the body to which Congress has committed the administrative process. *Phelps Dodge Corp. v. NLRB*, 313 US 177." (159 F.2d at p. 954) (respondent's emphasis)

Section 101.15 of the Board's rules provides:

> "After a Board order has been enforced by a court decree, the Board has the responsibility of obtaining compliance with that decree. Investigation is made by the Regional Office of the re-

[20]There is authority for the suspension of all backpay when it is attributable to the Board's delay. *NLRB v. Trama*, 293 F. 2d 28 (9th Cir. 1961).

spondents efforts to comply.[21]

The Board seeks to justify its failure to discharge this responsibility by reference to the heavy case load and limited personnel in its regional office, and avers that "for this reason, the Board did not write the company specifically concerning the backpay aspects of the company's case until March 1960 . . . ."[22] This assertion is gratuitous, and is contrary to the previous admissions of delay by representatives of the Board. In the Fifth Circuit's decision refusing to permanently enjoin the backpay hearing, the Court stated:[23]

> "In effect, counsel for the Board has admitted the obvious assertion of the employer that there has been inordinate delay in the case."

During oral argument of the petition to review the backpay award, the Board's counsel admitted that the Board was "redfaced" about its own delay.[24] In a belated attempt to justify its failure to act with reasonable promptness, petitioner argues that the New Orleans Regional Office was understaffed and that the case load was excessive. The Board makes no reference to the fact that the New Orleans Regional Office *was commended for its unusually rapid handling of its cases during the period of delay about which respondent complains.*[25] It is abundantly clear from the record that the Board did not begin to

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[21]29 CFR 101.15.
[22]Page 5 of petition for certiorari.
[23]*NLRB v. J. H. Rutter-Rex Manufacturing Company*, 305 F. 2d 242, 244 (5th Cir. 1962).
[24]Transcript of Argument, R. Vol. 11, p. 58.
[25]R. 721-722.

work on the compliance phase of the case until late in 1960 or early in 1961.[26]

Petitioner's argument in support of the petition is that under no circumstances should any breach of its duty to act with reasonable dispatch be asserted as a defense by a respondent in a backpay hearing. Carried to its logical conclusion, this could mean that petitioner could have delayed the filing of the specification, not for four years, but perhaps for ten or twenty years and thereby have assured the bankruptcy of this or any respondent. But as stated in *Deering Milliken, Inc.*, supra, at page 863:

> "The explicit provisions of § 10(e) of the Administrative Procedure Act, that the courts shall compel agency action unlawfully withheld or unreasonably delayed, is an affirmative statutory declaration of the congressional purpose that the requirement in § 6 of that Act, that

[26]Although the Board was advised of the details of the reinstatement program in 1957 (R. 950-957), it was not until March 22, 1960 that the Board requested respondent's payroll records "to analyze the amounts of backpay due and the rights of employment of strikers" (R. 958). It was in this letter that the Board stated that it realized it was in the position "of having delayed action in the matter over a period of several years". The Social Security records which the Board states it was required to review in its investigation were not obtained until 1961. Many of the claimants' authorizations to the Board to obtain these records are in Volume X of the record. These are not dated but some contain a "Received" stamp affixed by the Board which is visible on the copy. Of the 14 authorizations in Volume X whereupon the date is discernible, 12 are dated in 1961. (R. vol. 10 pp. 205 216, 219, 221, 224, 232, 238, 260, 267, 281, 284.)

Twenty-three of the affidavits taken by the Board from claimants are in the supplemental certified record. Thirteen are dated in 1961 and ten in 1960. (Exhibits R-6, 7, 10, 13, 18, 30, 38, 48, 50, 51, 52, 66-B, 73, 74, 84, 94, 113, 124, 128, 133, 134, 137, 172.)

The Board addressed form letters to the claimants requesting information on attempts to return to work at the company. Copies of nine such letters are in the supplemental certified record and with the exception of two dated in May and December 1960, all are dated in 1961. (Exhibits R-81, 86, 97, 98, 139, 144, 173, 195, 201.)

It is also interesting to note that the affidavit of the Regional Director (R. 732-7334) which was intended to prove the fact that the Regional Office was understaffed and overworked makes no reference to when the Regional Office began to work on the Rutter Rex compliance problems.

> agency action be concluded with reasonable dispatch, gives rise to legally enforceable rights of the parties to the proceeding. Its formally declared intention is fully supported by the legislative history. The committee report in the Senate said that the requirement that agencies proceed with reasonable dispatch to conclude the matter presented is a 'legal requirement' that an agency shall not deny relief or fail to conclude a case by mere inaction. Of the same requirement, the report of the committee in the House says that no agency 'shall in effect deny relief or fail to conclude a case by mere inaction, or proceed in a dilatory fashion to the injury of the person concerned. *No agency shall permit any person to suffer injurious consequences upon unwarranted official delay.*'" (respondent's emphasis)

CONCLUSION

Petitioner's attempt to equate the action of the Court of Appeals with the doctrine of laches proceeds from the assumption that the award of backpay is mechanically compelled as a matter of law. But as stated by this Court in *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177, 198 (1941):

> "The remedy of backpay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act."

The Court may review the Board's exercise of its discretion in a case in which it has found that the Board has increased the backpay award by delays which are unreasonable. Petitioner's attack on the adjustment of the backpay period in this case, if successful, would establish the principle that under no circumstances may a review-

ing court adjust a backpay award, regardless of the extent and nature of the Board's delay in the performance of its functions. If this were the law, a regional director who was so disposed could increase the liability of a respondent by prolonged inaction. It is no answer to say, where a reinstatement order is involved, that an employer can limit its exposure by immediately reinstating everyone who applies for reinstatement, for reinstatement problems involving large numbers of employees are not simple. In reinstating one employee, a company may violate the employment rights of another. No employer can be certain that its actions will satisfy a Board Agent who critically examines them many years after the fact. Where, as in this case, the Board issues a general order which is analogous to an interlocutory judgment, and does not fulfill its obligation to work out the details of compliance with the order, the minimum requirements of due process are not met when the Board criticizes the reinstatement program of the employer after the fact and imposes a substantial monetary penalty because the employer did not do precisely what the Board says it should have done under its imprecise order. The petition for certiorari filed by the Board should be denied.

Respectfully submitted

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CERTIFICATE

It is certified that three copies of the foregoing opposition to petition for writ of certiorari by the National Labor Relations Board have been served by mail, by depositing the same in a United States mail box, first class airmail postage prepaid, addressed as follows:

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